No. 14-916

IN THE

Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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The government does not dispute that this case presents a pure question of statutory construction. It does not and cannot identify any vehicle problem that would preclude reaching that question. Nor does it dispute that the question is exceptionally important: The Federal Circuit's interpretation governs the procedures used to award billions of dollars in contracts and profoundly affects the opportunities available to veteran-owned and service-disabled veteran-owned small businesses. In short, this case squarely presents a pure question of law on an issue of national importance, and the government does not even attempt to argue that many of the traditional criteria for denying review apply.

The government instead devotes its opposition to defending the merits of the decision below. But arguing that the Court should deny review on the merits by prejudging those same merits puts the cart before the horse and ignores the substantial criticism of the government's shifting position throughout this case. The Government Accountability Office rejected the government's interpretation in numerous bid protest decisions, only to have the Department of Veterans Affairs take the highly unusual step of disregarding the GAO's guidance. And Judge Reyna's dissent in the Federal Circuit thoroughly and persuasively criticizes the majority opinion's analysis that the government now defends.

Indeed, far from supporting the government, the underlying merits strongly favor reversing the Federal Circuit's decision. The text, context, purpose, and history of the 2006 Veterans Act all confirm that Congress learned from the failure of prior discretionary measures to improve contracting opportunities for veteran-owned small businesses and chose to enact a mandatory

"Rule of Two" specific to the VA—the agency primarily responsible for reintegrating America's veterans into the economic fabric of the country after their military service.

The government's dismissive view of the alleged "waste and inefficiency" (Opp. 15) of the statute as drafted also reinforces the need for review. The statute says that the VA "shall award" contracts on the basis of competition restricted to small businesses owned by veterans when the requirements of the Rule of Two are satisfied. 38 U.S.C. § 8127(d). It is not for an agency of the Executive Branch to disregard that clear command based on its own reweighing of the policies Congress adopted. If permitted to stand, the Federal Circuit's decision will deprive large numbers of veteran-owned and service-disabled veteran-owned small businesses of contracting opportunities Congress intended to provide for them. American Legion Br. 18-20; NVSBC Br. 4, 11. The petition should be granted, and that decision should be reversed.

I. THE GOVERNMENT'S DEFENSE OF THE DECISION BELOW CONFIRMS THAT REVIEW IS WARRANTED

The government's defense of the decision below falls far short of showing that the Federal Circuit's divided and heavily criticized ruling on the exceptionally important question of statutory interpretation presented here should be allowed to stand without further review. Indeed, the government's adoption of the Federal Circuit's errors drives home the importance of granting the petition.

A. Prefatory/Operative Distinction

1. The government places dispositive weight on the "for purposes of meeting the goals" clause in

§ 8127(d). Opp. 13-14. However, that prefatory language does not limit the operative force of the Rule of Two mandate. Pet. 25-26; American Legion Br. 14-18.

The government contends that the "for purposes of meeting the goals" clause would be "meaningless" if the VA were required to apply the Rule of Two "even after th[e] goals have been met or exceeded." Opp. 15. But the government misunderstands the role of such a prefatory clause, which is to state a purpose but not delimit the bounds of the statute. For example, "if a statute provides that dogs are to be muzzled *for the purpose of* stamping out rabies they must continue to be muzzled so long as the statute is in force, even though rabies has been stamped out." Hibbert, *Jurisprudence* 95 (1932) (emphasis added); *see* Scalia & Garner, *Reading Law* 220 (2012).

In *District of Columbia* v. *Heller*, this Court explained that a prefatory clause is one that "announces a purpose." 554 U.S. 570, 577 (2008). That is precisely what the clause here does: "[F]or *purposes* of meeting the goals" the Secretary sets, VA contracting officers "shall" apply the Rule of Two. This general expression of a desired outcome does not trump the unequivocal command in § 8127(d)'s operative clause.

The government argues that the placement of the "for purposes of" clause in § 8127(d), rather than in a formal preamble beginning with "whereas," shows that it must be operative. Opp. 18-19. Case law and common sense are squarely to the contrary. Congress may announce its purposes wherever and however often it wishes in a statute, and need not do so only in a separate and self-contained preamble. *See, e.g.*, *Heller*, 554 U.S. at 578 & n.3 (introductory clause of amendment distinct from preamble to Constitution); *Parish Oil Co.*

v. *Dillon Cos.*, 523 F.3d 1244, 1249, 1253 (10th Cir. 2008) (introductory clause of § 113 of Colorado's Unfair Practices Act, which also has a separate purpose section); *SEC* v. *Straub*, 921 F. Supp. 2d 244, 260-261 (S.D.N.Y. 2013) (non-operative "statement of purpose" at the end of statutory provision); *see also Reading Law* 220 ("Expressions of purpose are usually placed [in a preface], but they do not have to be."). The government cannot offer a single example in which similar language has been given operative effect to override a mandatory command.

2. The government's interpretation is further undermined by its failure to articulate clearly and consistently how it thinks the "for purposes of meeting the goals" clause should be given operative effect. At points, the government implies that its only objection is to applying the Rule of Two "after" the annual goals are met. Opp. 15. But the VA does not treat the Rule of Two as mandatory for all acquisitions *until* the annual goals are met. Instead, it interprets the statute as mandating use of the Rule of Two only "if the contracting officer determines *in his or her discretion* that a specific procurement should be set aside" to help meet the annual goals. Resp. C.A. Br. 16 (emphasis added); *see* Opp. 21. That reading "guts the Rule of Two imperative." Pet. App. 22a (Reyna, J., dissenting). For a given acquisition, the statute would operate the same way if the mandatory "shall award" language in § 8127(d) were replaced with "may award."

The government nevertheless takes pains to disclaim any reading of § 8127(d) as merely "permissive." Opp. 17 ("the word 'shall' is mandatory," not "discretionary"); *see id.* 12, 13, 14 ("mandatory"). It does so for good reason: Reading "shall" in § 8127(d) as mandatory is the only defensible construction of the statutory text,

especially in contrast to "may" in § 8127(b) and (c). Pet. 23-25. The government's effort to achieve the same permissive outcome, even while feigning to regard the statute as mandatory, is telling.

At bottom, the Federal Circuit held that § 8127(d) imposes no constraints at all on the VA's choice of procurement methods "as long as the goals set under subsection (a) are met." Pet. App. 20a. The effect, in the government's view, "is to make achievement of the Secretary's goals mandatory" but not to mandate use of the Rule of Two to meet or exceed the goals. Opp. 14. Had Congress intended that result, it could have said that the Rule of Two is mandatory "if the goals are not met," or that the agency "shall" meet annual goals and "may" use the Rule of Two to do so. It did not.

B. Annual Goals And Mandatory Procedures

The government also embraces the Federal Circuit's view that § 8127(a)'s "'goal-setting provision is itself made superfluous' under petitioner's reading." Opp. 15. But service-disabled and other veteran-owned small businesses must clear certain hurdles to be eligible for consideration (Pet. 14), and § 8127(d) requires that competition be limited to such businesses only when there is a "reasonable expectation" of two or more eligible bids "and that the award can be made at a fair and reasonable price that offers best value to the United States." The statute does not guarantee that any number of contracts will be awarded to veteran-owned small businesses or that any annual goals will be met.

Mandating both goal-setting and application of the Rule of Two was sensible, not "bizarre" (Opp. 14). Transparent public goals allow the agency and Con-

gress to measure progress and to impose accountability when the agency falls short. A shortfall might, for example, signal that § 8127(d) is not being implemented properly or that the VA needs to do additional training or outreach to eligible businesses. The goals can also help guide the VA's discretionary authority to award contracts to veteran-owned small businesses under § 8127(b) and (c). Pet. 27-28, 32-33.

More broadly, the government never explains *why* Congress would not have wanted the VA to continue to use the Rule of Two after its annual goals are met. Annual contracting goals are "aspirations, not destinations," and exceeding them is laudable. Pet. App. 30a (Reyna, J., dissenting). Indeed, the government itself recognizes that Congress's objective was "for the VA to contract with small businesses owned by veterans (and service-disabled veterans) at *or above* the percentage rates the Secretary seeks to achieve." Opp. 13 (emphasis added). The Federal Circuit's decision encourages the VA to treat its goals as a ceiling.

C. Legislative History

The government contends that its reading is supported by the legislative history (Opp. 20), but the opposite is true. The 2006 Veterans Act was adopted after years of frustration with the failure of federal officials to use the discretionary tools *already* available to them to satisfy government-wide contracting goals for veteran-owned small businesses. Pet. 11-14, 28-30; American Legion Br. 21-22. In response, Congress intended to require that veteran-owned small businesses "routinely be granted the primary opportunity to enter into VA procurement contracts." H.R. Rep. No. 109-592, at 14-15 (2006).

The government's contrary view misreads a joint statement issued by the House and Senate Committees on Veterans' Affairs. The Committees explained that in some circumstances VA contracting officers "would be allowed to award non-competitive contracts" to veteran-owned small businesses under § 8127(b) and would be "allowed, but not required, to award sole source contracts" to such businesses under § 8127(c). 152 Cong. Rec. 23,509, 23,515 (2006). The Committees then explained, in the sentence cherry-picked by the government, that "[c]ontracting officers would retain the option to restrict competition" using the Rule of Two under § 8127(d). *Id.* That is not a general description of the Rule of Two as merely an "option," but rather a recognition that the Rule of Two may be used even when circumstances permit use of the discretionary ("may use" and "may award") sole-source or non-competitive provisions in the statute.

The joint statement thus does not support the government's interpretation, and it certainly does not detract from the other evidence showing that Congress intended to mandate use of the Rule of Two. At a minimum, in the face of "plain and precise statutory language," the government fails to identify any "clear evidence that reading the language literally would thwart the obvious purposes of the Act." *Mansell* v. *Mansell*, 490 U.S. 581, 592 (1989).

D. Agency Regulations

The government's argument for deference is equally unpersuasive. Opp. 20-23. The implementing regulations, 48 C.F.R. §§ 819.7005(a) and 819.7006(a), repeat the mandatory language of § 8127(d) and *omit* the very phrase—"for purposes of meeting the goals"—that the government now claims to be the "centerpiece" of the

statute (Opp. 15). The plain language of the regulations therefore requires application of the Rule of Two in this case. The additional sentence that the government quotes (Opp. 22) merely favors service-disabled veterans over other veterans and does not "change[] the regulations' tenor" (*id.* 23).

Perhaps recognizing this difficulty, the government focuses on a statement in the rulemaking preamble broadly asserting that "set-asides do not apply to [Federal Supply Schedule] orders." *VA Acquisition Regulation*, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009). But the preamble is not law, was not subject to notice-and-comment procedures, and would not be entitled to deference, even if the statute were ambiguous. Pet. 31. Moreover, the VA abandoned the actual reasoning of the preamble—which cited inapplicable provisions of the Federal Acquisition Regulation—after the GAO conclusively debunked it. *Id.* 17.

The Federal Circuit's strained effort to resolve the case in the government's favor at *Chevron* step one appears to have been driven by concern that acknowledging *any* ambiguity in the statute would necessitate a victory for petitioner under the VA's own regulations. This dependence on the incredible assertion that § 8127(d) *unambiguously* requires the interpretation adopted below provides yet another reason for review.

II. Contrary Policy Views Provide No Grounds For Disregarding The Statutory Text

It is a bedrock principle, grounded in the constitutional separation of powers, that any "appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute." *TVA* v. *Hill*, 437 U.S.

153, 194 (1978). The Federal Circuit's results-driven approach to § 8127(d) violated that principle. Pet. App. 22a (Reyna, J., dissenting).

The government echoes the same policy disagreement, decrying the supposed "waste and inefficiency" (Opp. 15) of applying the statute as written. None of the government's policy concerns provides any reason to second-guess the plain text of the statute.

First, the government makes only a half-hearted attempt to defend the panel's reliance on unverified contracting statistics—requested at oral argument—purporting to show that the VA has met its contracting goals under its interpretation of § 8127(d). The figures the government provided were admittedly inaccurate as to at least 2010 and likely other years. Pet. 21 n.4. The government's claim (Opp. 8 n.2) that the inaccuracies were caused solely by subcontracting verification problems that were later fixed is belied by the audit itself. *See* VA OIG, *Audit of Veteran-Owned and Service-Disabled Veteran-Owned Small Business Programs* 12 (July 25, 2011) (faulting "ineffective oversight," "lack of coordination," and "purposeful[]" misconduct).

Moreover, the senior procurement official for the VA recently testified before Congress that "VA small-business goal accomplishments have been and continue to be overstated" and that the VA has "duped the veteran-owned business community" by inflating its purported annual achievements. Jan R. Frye, VA Deputy Ass't Sec'y for Acquisitions & Logistics, *Statement to the Subcomm. on Oversight & Investigations of the H. Comm. on Veterans' Affairs* 2 (May 14, 2015); *see also* Rein & Wax-Thibodeaux, *Official: VA Improperly Spent $6 Billion on Care*, Wash. Post, May 14, 2015, at

A3 (describing Frye's account of a "culture of 'lawlessness and chaos'" and orders placed from supply contracts "for higher prices ... 'indiscriminately and not in accordance' with acquisition laws").

Second, the government's discussion of efficiency entirely ignores the administrative difficulties created by the decision below. Construing the Rule of Two as mandatory only if the goals are *not* met leaves the operation of the statute at best unclear and at worst unworkable. Pet. 28; NVSBC Br. 15-18. A mandate that switches on and off would work "real mischief" by "saddl[ing] contracting officers" with the administrative burden of "determin[ing] the status of the agency's small business goals" before every acquisition. Pet. App. 32a (Reyna, J., dissenting). Applying the text of the law as written would be far less disruptive to day-to-day contracting activity.

Third, the government exaggerates the cost of complying with the Rule of Two and disregards the substantial safeguards built into the law. By the terms of the statute, no award can be made under the Rule of Two unless there is a reasonable expectation that "the award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). The government will not be overpaying for "a griddle or food slicer." Opp. 12.

That leaves only the argument that contracting officers should not be put to the supposed inconvenience of considering whether small businesses owned by the nation's veterans can provide goods and services on acceptable terms. Opp. 2-3, 15-17, 23. However, determining whether the requirements of § 8127(d) are satisfied need not be onerous. Pet. App. 30a-31a (Reyna, J., dissenting). The 2006 Veterans Act requires the VA to

maintain a database of veteran-owned small businesses, so contracting officers already have a ready list of eligible suppliers. Pet. 14-15, 35; *see* 38 U.S.C. § 8127(e)-(f).[1] Having required those businesses to submit to elaborate and costly verification procedures, the government can hardly now complain that consulting its own database would be inefficient.

Fourth, and most importantly, the policy decision to impose a mandatory Rule of Two for all VA acquisitions and the attendant weighing of costs and benefits has already been done by Congress. For years, Congress heard from the veteran community about the "culture of indifference" among federal contracting officers. H.R. Rep. No. 109-592, at 15. Congress enacted § 8217(d) to remedy that problem and to ensure that contracting officers at the VA "shall" consider veteran-owned small businesses even when VA officials would prefer not to as a matter of bureaucratic convenience.

Criticizing § 8217(d) as inefficient is not only wrong but beside the point. The statute serves other interests Congress chose to prioritize here, as it has elsewhere. *E.g.*, *Conroy* v. *Aniskoff*, 507 U.S. 511, 517 (1993) ("deliberate policy judgment" in favor of service-members at the cost of "occasionally burdening the tax collection process"). The 2006 Act is an expression of the profound debt the country owes to those who served in the military and to their families. It is also an affirmation of Congress's faith in the capacity of America's veterans to provide many of the goods and services needed by the VA. The decision below guts that congressional policy choice and should be reversed.

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[1] Consulting the database is already supposed to be a mandatory part of pre-acquisition market research. 48 C.F.R. § 810.001.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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